

1 [Counsel for Moving Defendants Listed on Signature Pages]
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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 **IN RE CAPACITORS ANTITRUST**
12 **LITIGATION**

13 **ALL INDIRECT PURCHASER ACTIONS**
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Case No. 3:14-cv-03264-JD

**DEFENDANTS' SUPPLEMENTAL BRIEF
IN SUPPORT OF PHASE I BRIEFING OF
DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT DISMISSING
PLAINTIFFS' INDIRECT PURCHASER
CLAIMS BASED ON FOREIGN SALES**

Date: January 19, 2017
Time: 10:00 a.m.
Judge: Honorable James Donato
Courtroom 11 – 19th Floor

INTRODUCTION

The Court has held that the Foreign Trade Antitrust Improvements Act (“FTAIA”) sets the outer bounds of the reach of all state competition laws. *See* Order re Phase I of Summary Judgment on Foreign Transactions, ECF No. 1302 (the “Phase I Order”), at 12-13. State competition laws, therefore, can only apply to claims stemming from alleged anticompetitive conduct outside the United States relating to foreign commerce in very limited circumstances, referred to by this Court as the “eye of th[e] needle” through which the FTAIA allows such claims. Two of the states at issue in the Indirect Purchaser Plaintiffs’ (“IPPs”) case, however, are even more limited in their reach. As the Court recognized, states may circumscribe the reach of their competition laws even further, for example by covering only anticompetitive conduct that occurs within such states’ borders. New York and Florida have enacted such a limitation.

The highest appellate court of New York, the Court of Appeals, has held that the Donnelly Act, the state’s antitrust law, only gives rise to a claim where there is “a very close nexus” between Defendants’ conduct and harm to competition in the state of New York. The Donnelly Act, accordingly, does not apply unless Defendants’ allegedly unlawful conduct had a “particular New York orientation”—and conduct that may have affected commerce nationwide or worldwide is insufficient to meet this requirement. As to the state’s consumer protection statute, New York’s high court has similarly held that conduct by Defendants that deceived a consumer must have occurred “within New York” to be actionable under the statute. The same is true under the Florida consumer protection statute—the only Florida claim IPPs assert. Only deceptive or unfair conduct that occurred within the territorial borders of Florida is actionable under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).

Applying the applicable state laws, whether viewed under the FTAIA or the even more narrow geographic limitations of New York and Florida law, Defendants will move to establish that the claims at issue in Defendants’ summary judgment motion¹—IPPs’ claims based on capacitors

¹ *See* Defendants’ Joint Motion for Partial Summary Judgment Dismissing Plaintiffs’ Indirect Purchaser Claims Based On Foreign Sales or, in the Alternative, To Simplify the Issues Under Fed. R. Civ. P. 16, ECF No. 911 (the “Motion” or “Mot.”), and Defendants’ Reply Memorandum in

1 sold by Defendants overseas to third-party distributors, which the distributors then sold to IPPs
2 within the United States—are ripe for dismissal from this case. Claims based on anticompetitive
3 conduct allegedly directed at such overseas sales simply cannot satisfy either the FTAIA or the more
4 stringent rules that apply to claims under New York and Florida law, even if there was a “pass
5 through” effect on sales in the various states.

6 **I. Defendants’ Summary Judgment Motion Against The IPPs’ Claims Based On Foreign**
7 **Sales Under The FTAIA Is Ripe For Decision Unless IPPs Come Forward With**
8 **Evidence To Satisfy An Exception To The FTAIA**

9 “The IPPs are individuals and companies who purchased stand-alone capacitors from
10 distributors, who in turn purchased those capacitors from defendants.” Phase I Order at 3.
11 Defendants’ motion for summary judgment was directed at the subset of IPPs’ claims that “involve
12 standalone capacitors first sold outside the United States to a third-party distributor that is not an
13 alleged conspirator.” *Id.* at 12 (quoting Mot. at 5).

14 The Court has now held that the FTAIA sets the outer boundary of the reach of all of the state
15 laws at issue in the IPP action. *See id.* at 13. As Defendants established in their summary judgment
16 papers, the FTAIA bars IPPs’ state law claims based on the challenged sales because (1) they are not
17 import commerce as the capacitors were not imported into the United States by a Defendant or
18 alleged co-conspirator (Mot. at 12-13; Reply at 12-13; *see also* Phase I Order at 5-7); (2) no
19 domestic effect of Defendants’ alleged conduct could have proximately caused antitrust injury to the
20 third-party distributors abroad that purchased the capacitors from Defendants outside the United
21 States, which the distributors then sold to IPPs in the United States (Mot. at 13-15; Reply at 9-12);
22 and (3) IPPs cannot meet the “direct” effect requirement of the FTAIA because by the very nature of
23 the transactions, any domestic effects of Defendants’ conduct did not follow as an immediate
24 consequence of the alleged overseas price-fixing conduct (Mot. at 15-16).

25 The Court has not yet ruled on any of Defendants’ arguments as to how the FTAIA applies to
26 the undisputed facts of the IPP case. *See* Phase I Order at 12-14. Defendants will show that it is
27 now ripe to do so. Specifically, based on the undisputed facts concerning the transactions at issue, as

28 Support of the Motion, ECF No. 987 (the “Reply”).

1 admitted by IPPs in their interrogatory responses cited in Defendants’ moving papers, it is clear that
2 such claims do not satisfy even the requirements of the FTAIA, let alone the more narrow confines
3 of New York and Florida law. *See* Mot. at 12-16 (citing IPPs’ responses to Defendants’
4 interrogatories). Because of the undisputed nature of the IPP claims at issue—involving allegedly
5 anticompetitive conduct directed at overseas sales to third-party distributors that then resold the
6 capacitors in the United States—Defendants’ position in the Motion was that there is no need for
7 further factual development in connection with the IPPs’ claims prior to the Court rendering
8 summary judgment. *Cf.* Phase I Order at 10-11 (concerning further factual development necessary in
9 DPP case). Nonetheless, the Court’s discussion of the FTAIA in the context of DPPs’ claims
10 suggests that additional factual submissions may be required to resolve the issue of whether “the
11 U.S. effects of the [Defendants’] conduct—i.e., increased prices in the United States—proximately
12 caused the foreign” injuries to the third-party distributors that IPPs claim purchased capacitors
13 overseas for resale in the United States. *See id.* at 10 (quoting *Empagran S.A. v. F. Hoffman-*
14 *LaRoche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005)). As such, Defendants have requested that IPPs
15 supplement their interrogatory responses to provide the facts that purportedly support their
16 contention that such sales meet the requirements of the FTAIA—i.e., to come forward with
17 significant probative evidence that there is even a genuine issue of material fact that they can thread
18 “the eye of that needle” and show that the sales at issue meet the “gives rise to” and “direct” tests of
19 the FTAIA. *See id.* at 10-11. Defendants will file a Phase II summary judgment motion directed at
20 that issue after IPPs have had the opportunity to identify any such facts.

21 Further, as discussed below, Defendants submit that, regardless of the FTAIA, both New
22 York and Florida have “limited the scope of [their] competition laws to conduct occurring wholly . . .
23 within [their] borders” *See* Phase I Order at 13. The result is that the Court should rule now
24 that IPPs cannot state any claims under New York or Florida laws relating to capacitors that were
25 first sold to third-party distributors overseas, before they were resold in those two states.

1 **II. Based On The Undisputed Facts, IPPs Have No Viable Claim Under The New York**
2 **Antitrust Statute Or Consumer Protection Statute**

3 **A. The New York Donnelly Act Does Not Apply To Defendants’ Overseas Sales To**
4 **Third-Party Distributors Because Defendants’ Conduct Did Not Have A**
5 **“Particular New York Orientation” With Respect To Such Sales**

6 As this Court observed, the highest court in New York has held that the Donnelly Act, New
7 York’s antitrust statute, has a more limited reach than the Sherman Act. *See* Phase I Order at 13.
8 Indeed, “[t]he established presumption is . . . against the extraterritorial operation of New York law .
9 . . .” *Global Reinsurance Corp. – U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 735 (2012) (citing 1
10 N.Y. Statutes § 149). Thus, to give rise to a Donnelly Act claim, there must be “a very close nexus
11 between the conspiracy and injury to competition in th[e] state” of New York. *Id.* at 736.

12 Although there is little authority examining the outer bounds of this “very close nexus,” the
13 facts of *Global Reinsurance Corp.* itself and the New York Court of Appeals’ analysis apply directly
14 to the transactions at issue in Defendants’ summary judgment motion against IPPs’ claims based on
15 capacitors first sold to third-party distributors outside the United States. Under the New York high
16 court’s analysis of the Donnelly Act, the IPP claims at issue are not sustainable as a matter of law.

17 In *Global Reinsurance Corp.*, the product at issue was an insurance product called
18 “retrocessional coverage.” *See id.* at 734. An alleged antitrust violation purportedly caused the
19 plaintiff to suffer “economic injury when retrocessional claims management services were by
20 agreement within th[e] London marketplace consolidated so as to eliminate competition over their
21 delivery.” *Id.* The “competing insurance syndicates” that participated in that marketplace were
22 collectively “the single most significant seller” of that type of insurance product “worldwide.” *Id.* at
23 726, 729 n.5.

24 As to the purchase that actually caused its injury, the plaintiff alleged that “its New York
25 branch purchased retrocessional coverage” from the seller abroad. *Id.* at 734. Thus, the plaintiff was
26 a **direct purchaser** that was “injur[ed] here,” in New York, because the purchasing branch was
27 “situated here” in New York. *Id.* Nonetheless, the New York Court of Appeals rejected the
28 plaintiff’s Donnelly Act claim because the “transaction” allegedly causing antitrust injury “ha[d] no
particular New York orientation” and thus was “not redressable under New York State’s antitrust

1 statute.” *Id.*

2 The exact same conclusion applies to the claims at issue here. A conspiracy directed at
3 foreign purchasers of capacitors, even if later resold in New York, would not have any “particular
4 New York orientation,” *see id.*, and no such New York orientation is even alleged. Indeed, the
5 plaintiff in *Global Reinsurance Corp.* was a direct purchaser in New York that made its purchase
6 from the defendants outside the United States—a fact pattern that this Court has stated would be
7 considered import commerce and thus not excluded by the FTAIA. *See* Phase I Order at 5-7
8 (capacitors invoiced to entities in the United States or delivered to entities in the United States are
9 import commerce). Despite these facts, the New York Court of Appeals held that the plaintiff did
10 not have claims under the Donnelly Act due to the lack of any sufficient New York orientation.²
11 Given this ruling by the highest state court in New York, it follows *a fortiori* that an indirect
12 purchaser in New York of a capacitor first allegedly sold to a distributor overseas at an
13 anticompetitive price would not have a Donnelly Act claim, because there would be no “particular
14 New York orientation” to the allegedly anticompetitive conduct that impacted the overseas sales.
15 *See Global Reinsurance Corp.*, 18 N.Y.3d at 734; *see also People ex rel. Cuomo v. Coventry First*
16 *LLC*, 861 N.Y.S.2d 9, 10 (2008) (“The Donnelly Act claim was properly dismissed to the extent that
17 *the alleged conduct did not take place ‘in this state’*”) (quoting Donnelly Act, N.Y. Gen. Bus. Law
18 § 340) (emphasis added); *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, No. 1:14-md-2508,
19 2015 WL 5166014, at *26 (E.D. Tenn. June 24, 2015) (dismissing Donnelly Act claim for failure to
20 allege any “connection between [New York] state and the wrongful conduct”).

21 **B. IPPs’ Claims Under The New York Consumer Protection Statute Are Not Viable**
22 **As A Matter Of Law Because Defendants’ Conduct With Respect To The**
23 **Challenged Sales Occurred Entirely Outside The United States**

24 Similar to the territorial limits on the application of the Donnelly Act, the New York high

25 ² Although the New York Court of Appeals initially examined the claimed conspiracy under the
26 framework of the FTAIA, it made clear that it did “not ultimately ground [its] determination that the
27 Donnelly Act does not reach the presently claimed conspiracy upon the FTAIA,” and “[e]ven if the
28 Sherman Act could reach the purported conspiracy,” it would still not be actionable under the
Donnelly Act. *Global Reinsurance Corp.*, 18 N.Y.3d at 736 (emphasis added).

1 court has also warned against the “unwarranted expansive reading” of the New York consumer
2 protection statute “potentially leading to the nationwide, if not global application of General
3 Business Law § 349” *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 325 (2002).
4 Instead, to establish liability for a claim under the consumer protection statute, IPPs must prove that
5 Defendants made an “actual misrepresentation or omission to a consumer,” and, crucially, “to
6 qualify as a prohibited act under the statute, the deception of a consumer **must occur in New York.**”
7 *Id.* (emphasis added). Based upon the undisputed facts regarding the category of commerce at issue,
8 it is impossible for IPPs to meet this burden as there is not even any factual allegations of a
9 deception by any of the Defendants in New York with respect to such sales.

10 Putting aside that IPPs have failed to allege or adduce evidence of any unlawful conduct by
11 Defendants within New York, let alone deceptive conduct directed **at consumers** in the state as New
12 York law requires,³ with respect to the specific transactions challenged in the Defendants’ summary
13 judgment motion, Defendants **could not** have made any misrepresentation or omission **in New York**
14 to any consumer, because the only sales at issue in the Motion were made by Defendants to third-
15 party distributors **outside the United States**, which then resold those products to customers in states
16 like New York. Thus, there can be no genuine issue of material fact as to whether any defendant
17 engaged in any “deception of a consumer [which] **must occur in New York**” as to sales that were
18 first made by Defendants to distributors outside New York. *See Goshen*, 98 N.Y.2d at 325
19 (emphasis added). Indeed, by definition, Defendants’ only conduct with respect to such sales
20 occurred outside New York. For this reason, the Court should enter summary judgment against
21 IPPs’ claims under New York’s consumer protection statute arising from the sales at issue in the
22 Motion. *See id.*; *People ex rel. Spitzer v. Direct Revenue, LLC*, 862 N.Y.S.2d 816, 2008 WL

23
24 ³ Even if there were evidence of deceptive conduct directed at the distributor direct purchasers of
25 capacitors from which IPPs allege they made their purchases, such conduct would not be sufficient
26 to maintain a claim under the New York consumer protection statute. *See In re Auto. Refinishing*
27 *Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 552-53 (E.D. Pa. 2007) (“New York courts . . . have
28 consistently held that when the conduct at issue is between two companies and does not involve the
ultimate consumer, it cannot be the basis of a claim under §349 . . . even when the result of the
deception impacts on a consumer[.]”).

1 1849855, at *7 (N.Y. Sup. Ct. March 12, 2008) (holding that § 349 claim was “jurisdictionally
2 defective” where “Petitioner nowhere alleges that respondent completed, in whole or in part, any
3 wrongful act . . . within the state” and that allegations of deception that “affected consumers
4 nationwide” were not enough).

5 **III. IPPs’ Claims Under The Florida Consumer Protection Statute Are Not Viable As A**
6 **Matter Of Law Because Defendants’ Conduct With Respect To The Challenged Sales**
7 **Occurred Entirely Outside The United States**

8 Florida also has a strong presumption against the extraterritorial application of its laws.
9 “Florida law cannot be applied extraterritorially unless the statute contains an ‘express intention that
10 its provisions are to be given extraterritorial effect.’” *Howard v. Kerzner Int’l Ltd.*, No. 12-22184-
11 CIV, 2014 WL 714787, at *5 (S.D. Fla. Feb. 24, 2014) (quoting *Burns v. Rozen*, 201 So.2d 629, 630
12 (Fla. Dist. Ct. App. 1967); citing *Se. Fisheries Ass’n, Inc. v. Dep’t of Nat. Res.*, 453 So.2d 1351,
13 1355 (Fla. 1984)).

14 This limiting principle against extraterritorial claims applies with full force to IPPs’ claims
15 under FDUTPA, Fla. Stat. §§ 501.201, *et seq.*⁴—“FDUTPA applies only to actions that occurred
16 *within the state of Florida.*” *Five for Entm’t S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1330-31
17 (S.D. Fla. 2012) (citing *Millenium Commc’ns & Fulfillment, Inc., v. Office of the Att’y Gen.*, 761
18 So.2d 1256, 1262 (Fla. Dist. Ct. App. 2000)) (emphasis added).

19 A FDUTPA claim has three elements: “(1) a deceptive act or unfair practice; (2) causation;
20 and (3) actual damages.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). It
21 is the first element—the location of defendants’ alleged **conduct**—that determines whether a
22 FDUTPA claim is within the territorial reach of the statute. *See Five for Entm’t*, 877 F. Supp. 2d at
23 1331 (dismissing FDUTPA claim where the plaintiff did not “specify the location of the conduct to
24 make certain it occurred within the territorial boundaries of Florida”); *Friedman v. Dollar Thrifty*
25 *Auto. Grp., Inc.*, No. 12-cv-02432-WYD-KMT, 2013 WL 5448078, at *6 (D. Colo. Sept. 27, 2013)
26 (FDUTPA does not apply “where no wrongful conduct was alleged to have occurred in Florida”); *cf.*
27 *Millennium Commc’ns*, 761 So.2d at 1262 (FDUTPA claim not barred where “the offending conduct

28 ⁴ IPPs’ only Florida claims are under FDUTPA.

1 occurred entirely within this state” even though the persons “affected by the conduct” were outside
2 of Florida).

3 As discussed *supra* in connection with IPPs’ claim under the New York consumer protection
4 statute, with respect to the specific transactions challenged in Defendants’ summary judgment
5 motion, Defendants ***could not*** have engaged in any deceptive or unfair conduct ***in Florida*** that
6 caused IPPs to have suffered damages because the only sales at issue in the Motion were made by
7 Defendants to third-party distributors ***outside the United States***. Thus, there can be no genuine issue
8 of material fact as to whether any defendant engaged in any deceptive or unfair conduct “within the
9 territorial boundaries of Florida” with respect to such sales. *See Five for Entm’t*, 877 F. Supp. 2d at
10 1331. Indeed, IPPs plead no allegations about deceptive or unlawful conduct by any Defendants in
11 Florida. For this reason, the Court should grant Defendants summary judgment against IPPs’ claims
12 under FDUTPA arising from the sales at issue in the Motion. *See id.*; *Nieman v. Dryclean U.S.A.*
13 *Franchise Co.*, 178 F.3d 1126, 1128-29 nn. 3 & 4 (11th Cir. 1999) (holding that FDUTPA does not
14 apply extraterritorially and rejecting claim based on conduct of defendant outside the United States).

15 CONCLUSION

16 For all the foregoing reasons, the Court should enter summary judgment against IPPs’ claims
17 under New York and Florida law to extent that such claims are based on capacitors first sold by
18 Defendants to third-party distributors outside the United States.

19 Notably, although Defendants’ Motion was directed only at IPPs’ claims based on sales
20 outside the United States, the territorial restrictions of New York’s Donnelly Act and consumer
21 protection statute, and of Florida’s consumer protection statute, would similarly apply to bar IPPs’
22 claims based on sales by Defendants to third-party distributors anywhere outside of New York or
23 Florida, respectively, even if those initial sales were made elsewhere within the United States. As
24 this issue was not raised in the Motion, Defendants reserve the right to move for summary judgment
25 against such sales on this ground at a later time.

1 DATED: November 4, 2016

Respectfully submitted,

2 WINSTON & STRAWN LLP

3 By: /s/ Jeffrey L. Kessler
4 Jeffrey L. Kessler (*pro hac vice*)
5 A. Paul Victor (*pro hac vice*)
6 Molly M. Donovan (*pro hac vice*)
7 Mollie C. Richardson (*pro hac vice*)
8 200 Park Avenue
9 New York, New York 10166
10 Telephone: (212) 294-4698
11 Facsimile: (212) 294-4700
12 jkessler@winston.com
13 pvictor@winston.com
14 mmdonovan@winston.com
15 mrichardson@winston.com

16 Ian L. Papendick (SBN 275648)
17 101 California Street
18 San Francisco, CA 94111
19 Tel: (415) 591-6905
20 Fax: (415) 591-1400
21 ipapendick@winston.com

22 *Counsel for Defendants*
23 *Panasonic Corporation*
24 *Panasonic Corporation of North America*
25 *SANYO Electric Co., Ltd.*
26 *SANYO North America Corporation*

27 WILMER CUTLER PICKERING HALE AND DORR
28 LLP

/s/ Heather S. Tewksbury
Heather S. Tewksbury (CA SBN 222202)
heather.tewksbury@wilmerhale.com
Erik Shallman (CA SBN 301854)
erik.shallman@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
950 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 858-6000
Facsimile: (650) 858-6100

Thomas Mueller (admitted *Pro Hac Vice*)
thomas.mueller@wilmerhale.com
Chris Megaw (admitted *Pro Hac Vice*)
chris.megaw@wilmerhale.com
WILMER CUTLER PICKERING

HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Margaret O'Grady (admitted *Pro Hac Vice*)
margaret.o'grady@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP

60 State Street
Boston, MA 02109
Telephone: (617) 526-6018
Facsimile: (617) 526-5000

*Counsels for Defendants ELNA Co., Ltd. and
ELNA America, Inc.*

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

/s/ Chul Pak

Chul Pak (*admitted pro hac vice*)
Jeffrey C. Bank (*admitted pro hac vice*)
Justin Cohen (*admitted pro hac vice*)
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 497-7758
Facsimile: (212) 999-5899
jjacobson@wsgr.com
cpak@wsgr.com
jbank@wsgr.com
jcohen@wsgr.com

*Attorneys for Defendants Hitachi Chemical Co., Ltd.,
Hitachi Chemical Company America, Ltd., and
Hitachi AIC Incorporated*

DENTONS US LLP

/s/ Bonnie Lau
Bonnie Lau
525 Market Street, 26th Floor
San Francisco, CA 94105
415-882-5000
Fax: 415-882-0300
Email: bonnie.lau@dentons.com

1 Felix T. Woo
2 601 S. Figueroa Street, Suite 2500
3 Los Angeles, California 90017
4 213-623-9300
5 Fax: 213-623-9924
6 Email: felix.woo@dentons.com

Attorneys for Defendant Matsuo Electric Co., Ltd.

6 GIBSON, DUNN & CRUTCHER LLP

7 /s/ George A. Nicoud III
8 GEORGE A. NICLOUD III, SBN 106111

9 AUSTIN V. SCHWING, SBN 211696
10 ELI M. LAZARUS, SBN 284082
11 tnicoud@gibsondunn.com
12 aschwing@gibsondunn.com
13 elazarus@gibsondunn.com
14 GIBSON, DUNN & CRUTCHER LLP
15 555 Mission Street
16 San Francisco, CA 94105-0921
17 Telephone: 415.393.8200
18 Facsimile: 415.393.8306

14 MATTHEW PARROTT, SBN 302731
15 mparrott@gibsondunn.com
16 GIBSON, DUNN & CRUTCHER LLP
17 3161 Michelson Drive
18 Irvine, CA 92612-4412
19 Telephone: 949.451.3800
20 Facsimile: 949.451.4220

*Attorneys for Defendants NEC TOKIN Corporation and
NEC TOKIN America, Inc.*

20 K&L GATES LLP

21 /s/ Michael E. Martinez
22 Scott M. Mendel (*pro hac vice*)
23 Steven M. Kowal (*pro hac vice*)
24 Michael E. Martinez (*pro hac vice*)
25 Lauren N. Norris (*pro hac vice*)
26 K&L GATES LLP
27 70 West Madison Street, Suite 3100
28 Chicago, IL 60602
Telephone: (312) 372-1121
Facsimile: (312) 827-8000

*Counsel for Defendants
Nichicon Corporation*

Nichicon (America) Corporation

HUNTON AND WILLIAMS LLP

/s/ Djordje Petkoski

Djordje Petkoski (admitted pro hac vice)
David A. Higbee (admitted pro hac vice)
Wendell L. Taylor (admitted pro hac vice)
Robert A. Caplen (admitted pro hac vice)
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Telephone: (202) 955-1500
Facsimile: (202) 778-2201
dpetkoski@hunton.com
dhigbee@hunton.com
wtaylor@hunton.com
rcaplen@hunton.com

M. Brett Burns (SBN 256965)
575 Market Street, Suite 3700
San Francisco, California 94105
Telephone: (415) 975-3700
Facsimile: (415) 975-3701
mbrettburns@hunton.com

*Attorneys for Defendants Rubycon Corporation and
Rubycon America Inc.*

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON, LLP

/s/ Charles F. Rule

Charles F. Rule
Joseph J. Bial
Daniel J. Howley
Eric R. Sega
2001 K Street, NW
Washington, DC 20006-1047
rrule@paulweiss.com
jbial@paulweiss.com
dhowley@paulweiss.com
esega@paulweiss.com

*Attorneys for Defendants United Chemi-Con, Inc. and
Nippon Chemi-Con Corporation*

BONA LAW PC

/s/ Jarod M. Bona

Jarod M. Bona

1 Aaron R. Gott (Admitted *Pro Hac Vice*)
2 BONA LAW PC
3 4275 Executive Square, #200
4 La Jolla, CA 92037
5 Telephone: (858) 964-4589
6 Facsimile: (858) 964-2301
7 Email: jarod.bona@bonalawpc.com
8 Email: aaron.gott@bonalawpc.com

9 *Attorneys for Taitso Corporation and Taitso America,*
10 *Inc.*

11 **BAKER & MCKENZIE LLP**

12 /s/ Darrell Prescott
13 Darrell Prescott (admitted *pro hac vice*)
14 Catherine Y. (Koh) Stillman (admitted *pro hac vice*)
15 452 Fifth Avenue
16 New York, NY 10018
17 (212) 626-4476
18 Fax: (212) 310-1637
19 Email: Darrell.Prescott@bakermckenzie.com
20 Email: Catherine.Stillman@bakermckenzie.com

21 Meghan E. Hausler (admitted *pro hac vice*)
22 2300 Trammell Crow Center
23 2001 Ross Avenue
24 Dallas, TX 75206
25 Telephone: (214) 965-7219
26 Facsimile: (214) 965-5937
27 Email: Meghan.Hausler@bakermckenzie.com

28 Colin H. Murray (SBN 159142)
Two Embarcadero Center, 11th Floor
San Francisco, CA 94111
(415) 591-3244
Fax: (415) 576-3099
Email: Colin.Murray@bakermckenzie.com

Attorneys for Defendants Okaya Electric Industries Co., Ltd.

BAKER & HOSTETLER LLP

By: /s/ John R. Fornaciari
John R. Fornaciari (admitted *pro hac vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20036

1 Tel: (202) 861-1612
2 Fax: (202) 861-1783
3 jfornaciari@bakerlaw.com

4 C. Dennis Loomis, Bar No. 82359
5 **BAKER & HOSTETLER LLP**
6 11601 Wilshire Boulevard, Suite 1400
7 Los Angeles, CA 90025-0509
8 Tel: (310) 820-8800
9 Fax: (310) 820-8859
10 cdloomis@bakerlaw.com

11 *Attorneys for Defendants*
12 Soshin Electric Co., Ltd and
13 Soshin Electronics of America Inc.

14 DENTONS US LLP

15 /s/ Gaspare J. Bono
16 Gaspare J. Bono (admitted *pro hac vice*)
17 Stephen M. Chippendale (admitted *pro hac vice*)
18 Claire M. Maddox (admitted *pro hac vice*)
19 Eric Y. Wu (admitted *pro hac vice*)
20 Dentons US LLP
21 1900 K St., NW
22 Washington, DC 20006
23 Tele.: (202) 496-7500
24 Fax: (202) 496-7756
25 gap.bono@dentons.com
26 steve.chippendale@dentons.com
27 claire.maddox@dentons.com
28 eric.wu@dentons.com

Andrew S. Azarmi (SBN 241407)
Dentons US LLP
Spear Tower, One Market Plaza, 24th Fl.
San Francisco, CA 94105
Tele.: (415) 267-4000
Fax: (415) 356-3873
andrew.azarmi@dentons.com

Attorneys for Defendants
Shinyei Kaisha,
Shinyei Technology Co., Ltd.,
Shinyei Capacitor Co., Ltd., and
Shinyei Corporation of America, Inc.

Pursuant to Local Rule 5-1(i)(3), the filer attests that concurrence in the filing of this document has been obtained from each of the above signatories.